

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

United States Court
Southern District of Texas
FILED

DEC 19 2005

Michael M. Milby, Clerk of Court

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

M & D, INC., DBA MARCELO'S
FAJITA GRILL AND MARCELO
GARCIA

Defendants.

Civil Action No. _____

COMPLAINT

Plaintiff, Elaine L. Chao, Secretary of Labor, United States Department of Labor, brings this action to enjoin the defendants, M & D, Inc. dba Marcelo's Fajita Grill ("Marcelo's") and Marcelo Garcia ("Garcia") from violating the provisions of Sections 6, 7, 11(c), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, et seq., hereinafter referred to as the Act, and to restrain defendants from withholding payment of minimum wage and overtime compensation found by the Court to be due employees under the Act, and an equal amount as liquidated damages due to the employees of Marcelo's listed in the attached Exhibit A.

I.

This court has jurisdiction over this action pursuant to sections 16 and 17 of the Act, 29 U.S.C. Sections 216 and 217 and 28 U.S.C. 1331 and 1345.

II.

1. Defendant, M & D, Inc. is now, and at all times hereinafter mentioned was, a corporation with a place of business and doing business at 11013 Delaney Street, La Marque, Texas

77568-2501, within the jurisdiction of this Court.

2. Defendant, Marcelo Garcia, has a place of business and doing business in La Marque, Texas, within the jurisdiction of this Court, where Garcia is, and at all times hereinafter mentioned was, the sole owner and proprietor of the defendant Marcelo's and actively manages, supervises and directs the business affairs and operations of the defendant, Marcelo's. Garcia acts and has acted, directly and indirectly, in the interest of the defendant, Marcelo's in relation to its employees and is an employer of these employees within the meaning of the Act.

III.

At all times hereinafter mentioned, Marcelo's has been an enterprise within the meaning of section 3(r) of the Act, 29 U.S.C. Sec. 203(r), in that Marcelo's has been, through unified operation or common control, engaged in the performance of related activities for a common business purpose.

IV.

At all times hereinafter mentioned, Marcelo's has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Section 3(s)(1)(A) of the Act, 29 U.S.C. § 203(s)(1)(A), in that it has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that it has an annual gross volume of sales made or business done of not less than \$500,000 (exclusive of excise taxes at the retail level which are separately stated).

V.

During the period beginning on May 4, 2003, defendants have violated and are violating the provisions of Sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), by paying

employees employed in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act at rates less than the minimum hourly rates required by Section 6 of the Act.

VI.

During the period since May 4, 2003, defendants have violated and are violating the provisions of Sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§ 207 and 215(a)(2), by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the Act for workweeks longer than forty hours without compensating such employees for their employment in excess of forty hours per week at rates not less than one and one-half times the regular rates at which they were employed.

VII.

As a result of the violations of the Act, minimum wages and overtime compensation has been unlawfully withheld by the defendants from their employees.

VIII.

During the period since May 4, 2003, defendants violated the provisions of Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), in that defendants have failed to make, keep and preserve adequate and accurate records of their employees and of the wages, hours, and other conditions and practices of employment maintained by them as prescribed by the regulations of the Administrator issued pursuant to Sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§ 211(c) and 215(a)(5), and found in Title 29, Chapter VI, Code of Federal Regulations, Part 516 in that their records failed to show, among other things, the hours worked each day and the total hours worked each week by many of their employees.

IX.

Defendants have violated the Act. A judgment enjoining the alleged violations and restraining the withholding of minimum wages and overtime compensation found to be due its employees is specifically authorized by Section 17 of the Act, 29 U.S.C. § 217.

X.

WHEREFORE, cause having been shown, plaintiff prays for judgment against M & D, Inc., dba Marcelo's Fajita Grill and Marcelo Garcia as follows:

- 1. For an Order pursuant to Section 17 of the Act permanently enjoining and restraining defendants, their officers, agents, servants, employees, and those persons in active concert or participation with defendants, from violating sections 6, 7, 11(c), 15(a)(2) and 15(a)(5) of the Act; and**
- 2. For an Order pursuant to Section 16(c) of the Act finding defendants liable for unpaid minimum wages and overtime compensation due to defendants' employees and for the liquidated damages equal in amount to the unpaid compensation found due defendants' employees listed in the attached Exhibit A (additional liquidated damages may be owed to certain employees presently unknown to plaintiff for the period covered by this complaint); or in the event liquidated damages are not awarded;**
- 3. For an Order pursuant to Section 17 enjoining and restraining defendants from withholding payment of unpaid minimum wages and overtime compensation found due defendants' employees and pre-judgment interest computed at the underpayment rate established by the Secretary of Treasury pursuant to 26 U.S.C. § 6621; and**
- 4. For an Order awarding plaintiff the costs of this action; and**
- 5. For an Order granting such other and further relief as may be necessary and appropriate.**

Address:

U. S. Department of Labor
Office of the Solicitor
525 Griffin Street, Suite 501
Dallas, Texas 75202
Telephone (972) 850-3151
Facsimile (972) 850-3101

RSOL Case No. 05-00844


Respectfully submitted,

HOWARD RADZELY
Solicitor of Labor

WILLIAM E. EVERHEART
Regional Solicitor

MARGARET TERRY CRANFORD
Counsel for Wage and Hour

By:


BRIAN L. HURT
Texas Bar. No. 24012876

Attorneys

Attorneys for Plaintiff

EXHIBIT A

Guillermo Alvarado

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Mario Rodriguez

JS 44 (Rev. 3/99)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other documents as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is to be used for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor

(b) County of Residence of First Listed _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Brian L. Hart, Esq.
United States Department of Labor, Office of the Solicitor
525 S. Griffin, Suite 501
Dallas, Texas 75202 (972) 850-3100

DEFENDANTS

M&D, INC., DBA MARCELO'S FAJITA GRILL AND MARCELO GARCIA

County of Residence of First Listed Galveston
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- X 1 U.S. Government Plaintiff
□ 2 U.S. Government Defendant
□ 3 Federal Question (U.S. Government Not a Party)
□ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | |
|-----|-----|---|-----|-----|
| PTF | DEF | | PTF | DEF |
| □ 1 | □ 1 | Citizen of This State | □ 4 | □ 4 |
| □ 2 | □ 2 | Citizen of Another | □ 5 | □ 5 |
| □ 3 | □ 3 | Citizen or Subject of a Foreign Country | □ 6 | □ 6 |
| | | Incorporated or Principal of Business in This State | | |
| | | Incorporated and Principal of Business in Another State | | |
| | | Foreign Nation | | |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defuncted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 490 State Reapportionment <input type="checkbox"/> 410 Arbitration <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 830 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 930 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- X 1 Original Proceeding
□ 2 Removed from State Court
□ 3 Remanded from Appellate Court
□ 4 Reinstated or Reopened
□ 5 Transferred from another district (specify) _____
□ 6 Multidistrict Litigation
□ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

To enjoin the Defendants, M&D, Inc., dba Marcelo's Fajita Grill and Marcelo Garcia, from violating the provisions of Sections 6, 7, 11(c), 15(a)(2) and 15 (a)(5) of the Fair Labor Standards Act of 1938 as amended, 29 U.S.C. § 201, et seq.

VII. REQUESTED IN COMPLAINT: □ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: □ Yes X No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE 12-14-05

SIGNATURE OF ATTORNEY OF RECORD

Brian L. Hart